SRI ALAM SDN. BHD.

v.

NEWACRES SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[SUIT NO. C189 OF 1985]
14 AUGUST 1992

CONTRACT: Construction of agreement - Principles to be applied - Agreement to jointly develop land - Whether agreement a joint-venture agreement - Whether fiduciary relationship created - Whether agreement turned parties into partners.

REPRESENTATION AND WARRANTY: Whether allegation of misrepresentation sustainable in the absence of fraud - Oral representation made prior to written agreement - Whether admissible - Particulars of alleged warranty not included in written agreement - Whether agreement contained whole contract between parties.

DEED OF ASSIGNMENT: Plaintiff assigned contractual rights to bank including right to sue defendant - Assignment absolute in nature - Effect - Civil Law Act 1956 s. 4(3).

The plaintiff and the defendant had entered into an agreement to jointly develop the plaintiff's land into a housing estate. In the course of negotiation prior to the agreement, the defendant intimated to the plaintiff that the plaintiff could make RM 100 million from the proposed venture. At the suggestion of the defendant the plaintiff applied for a loan from the United Malayan Banking Corporation and subsequently went on to execute an assignment with the said bank whereby the plaintiff's rights under the agreement were assigned to the bank. Misunderstandings later arose between the parties in respect of the implementation of the agreement and having been unable to resolve their differences the plaintiff instituted this action against the defendant.

The gist of the plaintiff's claim centred on the allegation that it had entered into the agreement and transferred the land to the defendant in reliance of a representation and a collatoral warranty by the defendant. The plaintiff also claimed that the agreement was in effect a Joint Venture Agreement and the terms of the agreement were such that the parties were in fact partners having fiduciary duties towards each other. Based on this footing, the plaintiff sought, *inter alia,* for a declaration that the defendant had acted in breach of its fiduciary duty and a further declaration that the plaintiff was entitled under the Joint Venture Agreement to receive from the defendant a sum of not less than RM 189,341,378.88.

The defendant argued that the agreement was not a Joint Venture Agreement but a Sale and Purchase Agreement and that no fiduciary relationship had ever existed between the parties. The defendant also made a counter claim for RM29,880,000 being the amount of a certain compensation that the plaintiff was liable to pay under the terms of the agreement.

Held:

[1] In construing a written agreement the Court is entitled to take into account the surrounding circumstances with reference to which the words of the agreement were used, and the object which the person using them had in view. But the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from the negotiations.

[2] There is clearly an intention to carry out a development project where each party would participate upon certain agreed terms. On the numerous and clear evidence before the court,there is no doubt that the parties have entered into a Joint Venture Agreement to develop the land.

[3] It is for the Court to decide whether the words in a document creates a fiduciary relationship or not. Upon considering all the terms of the Joint Venture Agreement and the evidence as a whole it is clear that in this case no partnership was intended or created. The plaintiff has only contractual rights under the Joint Venture Agreement,but contractual rights do not give rise to fiduciary duty.

[4] The law is clear that a party cannot rely on inducement unless it can show that it has suffered damages as a result of relying on the inducement. In this case the defendant only made a bare statement that the plaintiff could make RM 100 million.Although the statement induced the plaintiff to enter into the agreement the plaintiff failed to show that it had relied on the defendant's representation completely. The statement was not a representation

of fact but merely an expression of opinion and it cannot therefore be regarded as representation or inducement.

[5] An allegation of misrepresentation must show that there was fraud. In the absence of the element of fraud there cannot be any misrepresentation. In the present case,as the plaintiff did not pursue with the allegation of fraud the allegation of misrepresentation cannot therefore succeed.

[6] The position in law is that once parties enter into a contract their rights are defined in the contract and precontractual promises merge into the contract.The Joint Venture Agreement clearly shows that it contains the whole contract between the parties. There is no reason to suggest that the parties had inadvertently left anything out of the agreement.In the event there is no warranty to the agreement as alleged by the plaintiff.

[7] In this case the notice of assignment was given to the defendant by the bank on 12 November 1984. Under s 4(3) of the Civil Law Act 1956 therefore the assignment became effectual as from that date and nothing that happens after the date can alter the effect of the section.The conduct of either the defendant or the plaintiff after the date of assignment became effectual cannot take away the right which has been vested in the assignee, the bank. This right would include the right of action against the defendant and therefore the plaintiff has no standing to maintain this action.

[8] As the plaintiff has admitted that it it bound to pay the compensation and as the parties agreed that the sum due is as that claimed by the defendant in the counter claim, judgement is therefore entered in favour of the defendant in the sum of RM29,880,000 as compensation for the loss of the bungalow lots.

[Plaintiff's claim dismissed. Judgement on the counter claim entered for the defendant].

Cases referred to:
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 ***(refd)***
PP v. Subramaniam [1956] ML J 220 ***(dist)***
Premn v. Simmonds [1971] 3 All E R 237 H.L. ***(refd)***
De Lassalle v. Guildford [1901] 2 KB 215 ***(refd)***
Esso v. Mardon [1976] 2 All E R 5 ***(dist)***
Paul Dainty Corpn. v. National Tennis Centre Trust 94 ALR 225 ***(refd)***
Midcon Oil & Gas v. New British Dominion Oil Co. Ltd. and Brook [1958] 12 DLR ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Income Tax Act 1967, s. 68(1)

For the plaintiff - G. Sri Ram (Joseph Yeo and V. Manokaran with him); M/s. Wan Majid & Mano
For the defendant - Lim Kean Chye and Mohd. Ismail (K.H. Koh and Koshi with them); M/s. Mohamed Ismail & Co.

JUDGMENT

Anuar bin Dato' Zainal Abidin J.
The plaintiff's claim against the defendant is for, *inter alia*, a declaration that the defendant has acted in breach of fiduciary duties arising from its relationship *inter se* the plaintiff under a Joint Venture Agreement dated 2 October 1980, and for the payment of all monies due to the plaintiff.

The statement of claim contains 19 paragraphs and runs into 15 pages. The reliefs sought in the statement of claim are as follows:

(1) a declaration that the defendant has acted in breach of its fiduciary duties;
(2) a declaration that the plaintiff is entitled to receive from the defendant a sum of not less than RM183,341,378.88;
(3) alternatively, for an order that this Honourable Court do assess a sum of money or other entitlement which the plaintiff is entitled to receive from the defendant;
(4) an order that the defendant do pay compound interest at the rate of 8% with monthly rests on the amount determined to be due and owing to the plaintiff from the dates on which such sums became payable on the footing of wilful default;
(5) a consequential order that the defendant do pay to the plaintiff (together with interest as aforesaid) all sums declared by this Honourable Court to be so payable as aforesaid;
(6) costs of this suit;
(7) further or other relief.

The gist of the claim is that it is alleged that the plaintiff entered into the Joint Venture Agreement and transferred the land to the defendant in reliance upon a representation and a collateral warranty by Tan Sri Ibrahim bin Mohammed and Chan Teik Huat (Dick Chan). The plaintiff raised the issue whether there is such a

collateral agreement between the plaintiff and the defendant antecedent to the Joint Venture Agreement, and whether the plaintiff is entitled to a sum of RM226,336,730.59 after the deduction of a sum of RM46,910,651.12 which had already been paid by the defendant to the plaintiff.

By paragraphs 12 and 13 of the statement of claim, the plaintiff states that the dispute between the plaintiff and the defendant relates to the implementation of the Joint Venture Agreement by the defendant, and by reason of the Joint Venture Agreement and by reason of all the circumstances of the case, the defendant is, at all material times, under a fiduciary duty to act honestly, reasonably and fairly and in all his dealings with the plaintiff. The plaintiff alleges that at all material times the defendant had acted in breach of its fiduciary duties.

Nature of relationship between the parties

The relationship between the plaintiff and the defendant is bound by a specific agreement entered into between the parties on 2 October 1980 (J27). Under this agreement the parties have set out various provisions to reflect the intention of their relationship.

Under the recital of the agreement it is clearly stated that the plaintiff is the registered and beneficial owner of the land and had obtained approvals for the development of the land. It is also clear that the plaintiff is desirous of developing the land for residential and commercial buildings. Under Clause (1) it is provided how apportionment of the shares of the developed land would be made.

Under clause (2) the parties have made provisions for the financial contribution by the defendant to the plaintiff.

Then there is provision for the final division of the profits from the project. There is D also provision of certain obligations on the part of the plaintiff to compensate for particular loss suffered by the defendant and the formula for such compensation.

The agreement clearly provides for the contribution each party has to give under the venture. The plaintiff's contribution is in the form of land for the development and the defendant's contribution, under this agreement, is financial.

The foregoing facts are in essence the basis of the relationship between the parties under the agreement. There is clearly an intention to carry out a development project where each party would participate upon certain agreed terms. The parties have entered into what is commonly accepted as a Joint Venture Agreement.

The plaintiff's case is that the relationship between the parties is one of a joint venture. The defendant however claims that the agreement is not a Joint Venture Agreement but a Sale and Purchase Agreement

It is pertinent to note that in the correspondence between the parties the defendant has never denied or challenged the fact that the true relationship between the plaintiff and the defendant is that of a joint venture. In these letters the defendant has clearly indicated or accepted the fact that the agreement between the parties is a Joint Venture Agreement. On the numerous and clear evidence before the Court, I have no doubt that the parties have entered into a Joint Venture Agreement to develop the land. I therefore reject the defendant's contention that it is a Sale and Purchase Agreement.

Admissibility of collateral contract or warranty

Inducement

It was submitted on behalf of the plaintiff that there was inducement and representation made to the plaintiff to enter into the agreement with the defendant. One of the Directors then, Tan Sri Ibrahim, gave his assurance and guarantee of the benefits to be gained if the plaintiff agrees to the Joint Venture Agreement. Tan Sri Ibrahim was known to PW1 and was trusted by him. Another Director of the company, Dick Chan, also gave similar assurance to PW1. PW1 had the impression that if the plaintiff agrees to enter into the Joint Venture Agreement, the plaintiff would be spared the task of looking for finance. The plaintiff would also be released from the burden of looking after the administration of the development project.

The plaintiff contended that this inducement, representation, guarantee and assurance, and more, was the main cause for the plaintiff to enter into the Joint Venture Agreement with the defendant.

PW1, in his evidence, stated that he had known Tan Sri Ibrahim for a number of years. Tan Sri Ibrahim had heard that PW1 was looking for financial assistance to carry out the housing

development over the land. Tan Sri Ibrahim then invited PW1 to meet Dick Chan who was one of the Directors of the defendant's company. When PW1 met Dick Chan he seemed to know what PW1 was looking for. Dick Chan gave PW1 the same promise and assurance as what Tan Sri Ibrahim had given him earlier. PW1 was given the impression that if the plaintiff agreed to enter into the Joint Venture Agreement the plaintiff would not have the problem to look for finance. That would be found by the defendant Further, PW1 was told that the plaintiff need not worry about the administration of the development project. That too would be undertaken by the defendant.

It is admitted that the plaintiff was not a housing developer. It had no licence to carry out housing development on its own. It had bought the land then sold some lots. It had however, no experience in this matter.

PW1 said in evidence that the defendant through its Directors had represented to him that the defendant has the experience and the necessary skill to carry out the project. PW1 believed this because the representation was made not by just anyone but made by people whom he considered to be experts in their field.

It was argued on behalf of the plaintiff that this oral representation is admissible in evidence. The learned Counsel for the plaintiff submitted that the agreement does not exclude evidence of collateral warranty and representation which induced the party to enter into the contract. Clause 19 of the agreement (p. J37) has the effect of excluding other agreements whether oral or written made prior to the date of the agreement. However, it was submitted that clause 19 does not exclude warranties or oral representation which induced the plaintiff to enter into the contract. The plaintiff contended therefore that it has the right to prove the oral representation which induced the plaintiff to enter into the contract with the defendant.

With respect I am of the view that clause 19 of the agreement excludes evidence of negotiation. Clause 19 states that this agreement supersedes and cancels all other agreements whether oral or written made prior to the date of this agreement. The position in law is that once parties enter into a contract their rights are defined in the contract and pre-contractual promises merge into the contract: See per Lord Reid in *Hedley Byrne* [1964] AC 465.

The question of inducement was also raised in the earlier proceeding in the case of C30 of 1985 between the same parties. In that case the plaintiff alleged that the defendant had given an inducement and committed fraud against the plaintiff. The plaintiff alleged that there was misrepresentation and fraud. In the present case however the plaintiff did not pursue with the allegation of fraud. In the event the allegation of misrepresentation in the present case cannot succeed. An allegation of misrepresentation must show that there was fraud. In the absence of the element of fraud there cannot be any misrepresentation.

The plaintiff's argument in the present case must now be confined to the issue of inducement. The question is whether the oral representation can be considered as inducement and whether it can also be regarded as warranties. The learned Counsel for the defendant objected to the admissibility of collateral contract saying that the learned Counsel for the plaintiff at the hearing before Justice Razak informed the Court that he would not lead any evidence on the collateral contract. The learned Counsel for the defendant submitted that the plaintiff is now estopped from raising the issue. However I allowed this issue to be raised. I feel that Counsel's undertaking before another Judge should not act as an estoppel where the circumstances were different.

The learned Counsel for the plaintiff submitted that collateral contract is admissible on the authority of *PP v. Subramaniam* [1956] MLJ 220. It is not necessary for me to repeat the facts of the case since this is a case which has often been relied upon in our Courts. This case, however, can be distinguished from the case before the Court. In the *Subramaniam's* case the persons who made the statement were not available to be called as witnesses in Court. Whereas in the present case the persons who made the statement are available to give evidence.

In the *Subramaniam* case the Privy Council held that the evidence of threat by the communist terrorists when the accused was among them could be proved to show the state of mind of the accused because it was an important element in the defence of duress. It was not admitted as evidence as to the truth of the statement. It was admitted merely to show the fact that he was influenced by certain statement which made him frighten and fear for his life.

In the present case the sum total of what PW1 said in evidence is that Tan Sri Ibrahim and Dick Chan told him that he would be able to earn from the joint venture project at least RM100 million or more. That statement had apparently influenced and induced him to agree to enter into a Joint Venture Agreement with the defendant.

It is to be noted that the meeting which PW1 referred to lasted only about one hour in Dick Chan's office. During that hour all the promises and representations were given. PW1 now claims that these promises and representations are important factors which the Court must weigh when considering the agreement between the parties. PW1 however did not say how he was actually influenced and/or induced to enter into the contract with the defendant. He did not for instance tell the Court that he would not have entered into the agreement if he had not been induced by the defendant to do so. PW1 did not tell the Court that be had actually other offers for the project but that the inducement had made him abandon the other offers.

It is also important to note that PW1 did not tell the Court whether he had suffered any loss as a result of entering into the Joint Venture Agreement with the defendant by the inducement. The law is clear that the plaintiff cannot rely on the inducement unless it can show that it has suffered damages as a result of relying on the inducement.

On the evidence before the Court I am unable to find any inducement or representation. At most the alleged inducement or representation is merely a statement in the course of discussion between the parties and can only be regarded as terms of negotiation.

Here is a case where the plaintiff has the land and the defendant has the money and expertise. The plaintiff has offered the land for development and in return the defendant has offered its management expertise and finance. These were the basis upon which the parties held the negotiation and subsequently entered into a Joint Venture Agreement. In my view the meeting in Dick Chan's office in August 1980 was nothing more than a discussion and negotiation between the parties with the view to find the best way to carry out the intended development of plaintiff's land. The discussion naturally led to the suggestion of the possibility of the parties entering into a Joint Venture Agreement.

In construing a written agreement the Court is entitled to take into account the surrounding circumstance with reference to which the words of the agreement were used, and the object which the person using them had in view. But the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. See *Premm v. Simmonds* [1971] 3 All ER 237 HL.

In my judgment based on the evidence as stated above the statements given by the defendant were not separate oral agreement as alleged by the plaintiff but were prior negotiations and therefore ought to be excluded.

Another important case on the question of warranty is *De Lassalle v. Guildford* [1901] 2 KB 215. This case sets out the meaning of warranty and the circumstances necessary to establish a case of warranty. The essence of the case is the reliance placed by the plaintiff on the defendant which reliance is known to the defendant. An important factor to be considered is the special knowledge of the defendant upon which the plaintiff relied upon. Another question to be considered is whether the contract between the parties contains all the conditions of the contract. If it contains the whole of the contract between the parties then no warranty would be allowed.

In the present case the Joint Venture Agreement clearly shows that it contains the whole contract between the parties. All the terms and conditions of the contract are set out in great detail. There is, to my mind, nothing left to be disputed. PW1 himself has clearly demonstrated by his action and his concern for some particular details to be correctly written in the agreement. There is no reason to suggest that the parties have inadvertently left anything out of the agreement. In the event I do not think there is a warranty to the agreement as alleged by the plaintiff.

PW1 is not exactly the picture of innocence as he would like us to believe. He appears to me to be a shrewd and experienced businessman having several companies under him. I believe he knew exactly what he wanted to do with the land and what he expected to get out of it. Even before he met Tan Sri Ibrahim and Dick Chan he had drawn up plan for subdivision of the land and then proceeded to sell the empty lots to purchasers. He did this well aware of the fact that

he had no developer's licence. He sold nearly 3,000 lots before the subdivision was approved.

PW1 appears to me to be a very careful person. This can be clearly seen from his action in insisting that certain facts are included in the agreement. He was very careful not to miss anything which he considered important. He is very meticulous with details and he made a number of amendments to the agreement so that even a minor detail is not left out of the agreement. Having regards to PW1's character I cannot see how he could have been induced by the defendant to enter into the agreement without safeguarding himself so that the representation and warranty are properly incorporated into the agreement. If there were such representation or warranty PW1 would certainly have insisted that they were included in the agreement and I do not think he would sign the agreement if they were omitted. In my view there were no such representation or warranty They were in fact terms of negotiation and ought not to be considered as an aid to the construction of the agreement.

The plaintiff referred to the case of *Esso v. Mardon* [1976] 2 All ER 5 for the proposition that there was a warranty. In that case the plaintiff (Esso) opened negotiation with the defendant for the grant to him of a tenancy of a petrol station. During the negotiation a representative of the plaintiff told the defendant in good faith that Esso had estimated that the throughput of petrol would reach 200,000 gallons a year in the third year of operation of the station. The defendant was aware of the deficiencies of the station and suggested that a lower estimate would be more realistic, but the representative's greater expertise quelled his doubts and on the basis of that representation the defendant was induced to enter into a tenancy agreement in 1963. At the end of the first 15 months only 78,000 gallons of petrol had been consumed at the station and the defendant had incurred a loss in running the station. The defendant continued trading until 1967 when he gave up possession. He had lost all the capital and had incurred substantial overdraft. By his defence and counter-claim the defendant claimed damages in respect of the representation made by the Esso's representation, alleging (i) that it amounted to warranty, and (ii) that it also amounted to negligent misrepresentation in breach of Esso's duty of care to the defendant in advising him as to the potential throughput.

With respect, this case can be distinguished from the case before the Court. In *Esso's* case there was absolute reliance on Esso for advice as to investment of money which the defendant lost. Esso was regarded as the expert on throughput. Its advice was therefore relied upon absolutely by the defendant. The essence of the case therefore is that the defendant relied on Esso's expertise which caused him to suffer damages.

In the case before me the evidence shows only a bare statement that the plaintiff could make RM100 million and that statement induced the plaintiff to enter into the agreement. But the plaintiff was unable to show it had relied on the defendant's representation completely. When PW1 met the defendant's Director to negotiate the contract he knew what he was going to build on the land. He knew the estimated cost and profit. The defendant merely says that probably the plaintiff would make RM100 million. I do not think that is a representation of fact. It is merely an expression of opinion on the part of the defendant which I think would not fool the plaintiff. I do not think such statement could be regarded as representation or inducement.

Partnership and Fiduciary Duty

In his evidence PW1 said that there is a partnership between the plaintiff and the defendant which imposes a fiduciary duty on the defendant. Partnership is not pleaded in the pleadings but nevertheless PW1 said that there is a partnership. In his evidence he said that the defendant has breached its duty **as a partner** and that he could not work with people like this. PW1 also said that he was a sleeping partner.

The plaintiff does not however make any allegation of underhand dealings. Nor was any equitable fraud ever raised. The agreement itself is very specific as can be seen in clause 5(a) where the parties have agreed to give the plaintiff fixed units of houses or building. For any additional units the plaintiff would be given another 12% of that additional units. The agreement also provides that the plaintiff would have the right to terminate the contract if it is not happy with the contract or if the contract is not completed within the period set down by the agreement. PW1 never claimed that the defendant has actually breached the agreement. What PW1 said was "They have broken their duty as partner" and "I cannot work with people like this. They have committed breach of trust".

When all the terms of the Joint Venture Agreement and the evidence as a whole are considered it is clear that no partnership was intended or created. PW1 failed to show in evidence that any such partnership exists. All he can say is that there is a partnership and that he is a sleeping partner without specifying how such partnership came into existence. Therefore the plaintiff has only contractual rights under the Joint Venture Agreement. But contractual rights do not give rise to fiduciary duty.

PW1 says that the plaintiff claims that the defendant is under a fiduciary duty imposed upon it by the agreement and by all the circumstances of the case. He did not however give the particulars. The plaintiff perhaps relies on the decision of the Supreme Court which indicated that the allegation of breach of this duty is set out in para 13 of the statement of claim. With respect the evidence does not support this allegation. Para 13(b)(i) of the statement of claim speaks of "Concealing or causing to be concealed from the plaintiff the actual cost of construction of several buildings upon the said land with a view to depriving the plaintiff of the actual benefits to which it is lawfully entitled".

PW1's evidence did not say one word about the particulars alleged to have been concealed. There is not one word about cost of construction. I am unable to find any evidence of breach of fiduciary duty from the plaintiff's bare allegation.

Under para 13(b)(ii) & (iv) of the statement of claim the plaintiff alleges that there is concealment of accounts. But PW1 in his evidence did not support this allegation. Instead he said there was obstruction whenever he wanted to examine the accounts. But PW1 in his evidence agreed that the plaintiff's accountant was sent to audit the account. There was no complaint about the account.

Para 13(b)(iii) of the statement of claim contains allegation of concealment of "The true sale prices of several buildings on the said land." There is no evidence to support this allegation. In his evidence PW1 merely complained that the defendant did not tell the plaintiff that the defendant was going to sell 2-storey shoplots at RM150,000. This is not true. In fact PW1 knew all the time that the defendant was going to sell the 2-storey shoplots at that price. It is therefore not true to say that there was a concealment.

Para 13(b)(v) of the statement of claim alleges the defendant "Taking steps to ensure that the plaintiff will receive little or no benefit from the said development ...". There is not a shred of evidence to support this allegation.

Para 13(b)(vii) of the statement of claim alleges "retaining or causing to be retained and utilising or causing to be utilised monies actually due to the plaintiff without revealing or causing to be revealed the same to the plaintiff". Again there is no evidence to sustain the allegation.

Para 13(b)(viii) of the statement of claim states "Refusing or failing to compensate the plaintiff for the wrongful conversion of the plaintiff's monies by the defendant for its own use". But PW1 did not say one word about this when giving evidence in Court.

Para 13(b)(ix) of the statement of claim states "Adopting or applying an arbitrary, unjust and grossly unfair formula to calculate the compensation payable by the plaintiff to the defendant under the Joint Venture Agreement". This is the compensation to the defendant for the loss of bungalow lots which the plaintiff had presold before the Joint Venture Agreement was entered into. The defendant's figure for the compensation is RM29,880,000. The plaintiff did not say it was not bound to pay this money. PW1 merely stated in his evidence that he was not happy with the price. However PW1 never offer any suggestion as to the amount of compensation that he would agree to pay. It is apparent that the challenge to the formula for the compensation is really not a serious objection.

Finally, para 13(b)(x) of the statement of claim states "Failing to allot to the plaintiff the houses, apartments and other buildings to which the plaintiff is lawfully entitled under the Joint-Venture Agreement". This is truly a wild complaint with no particulars. It is probably an "umbrella" claim giving the plaintiff an opportunity to widen the scope of its claim. This paragraph actually does not disclose the fact that the allocation was on a cash basis. But the plaintiff later changed and demanded for physical units.

The above paragraphs are inherently difficult to understand how they could support the complaint about breach of fiduciary duty. PW1 has been talking "in fairness, we want fair and just". The very term itself shows no fiduciary duty involved.

The Court will have to decide whether on the evidence given there is a fiduciary relationship between the parties. It is for the Court to decide whether the words in the document creates a fiduciary relationship or not.

Looking at clause 5 of the Joint Venture Agreement it can be seen how strictly the terms are set out. Fixed units are to be given to the plaintiff and fixed 12% are added on additional units and then it has got the right of termination of the contract if it is unhappy or the contract is not completed within the period set down by the agreement.

In *Paul Dainty Corpn. v. National Tennis Centre Trust* 94 ALR 225 the Court goes through the agreement in great detail to find out what is the relationship between the parties. Similarly in the case before me the Court has a task to examine the Joint Venture Agreement to find out what the relationships are between the parties.

There is another aspect of the subject namely the imposition of fiduciary duty. The Court has taken the view that public policy requires the imposition of fiduciary duty. However in *Midcon Oil & Gas v. New British Dominion Oil Co. Ltd. and Brook* [1958] 12 DLR (2nd) the Court held that circumstances must govern the application of the principle. The plaintiff must have a pretty strong case in the face of commercial agreement to impose on the defendant a fiduciary duty.

In his evidence PW1 alleged that the defendant was "placing unfair construction on the agreement". There was no allegation of any act of equitable fraud. Then the plaintiff raised the issue of compensation and what is the amount of compensation payable. PW1, in his evidence, used expressions which destroys his case for fiduciary duty.

It is apparent from the pleading and the evidence of PW1 the real issue is not a breach of fiduciary duty, it is not a breach of trust but in effect a breach of contract. In breach of contract there is always a sum due to the plaintiff. The plaintiff should then terminate the contract in order to claim the sum due. If there were problems in implementing the agreement then the parties should resolve the difference. In this case it is provided that where there is a dispute as regards the implementation of the agreement the parties may go to arbitration. If the plaintiff does not terminate the contract then there is still time left to end the contract. If there was some short payment the defendant will still have time to pay the plaintiff when the contract is still in existence. The complaints in this case can only be described as anticipatory breach of contract. To my mind the allegation of a fiduciary relationship is not supported by the evidence.

Deed of assignment

The plaintiff contended that at the suggestion of the defendant, the plaintiff should obtain a loan from the United Malayan Banking Corporation (UMBC). There was a meeting at the office of UMBC where the loan was agreed upon. The plaintiff contended that the loan was approved by the bank based on the representation of the defendant that a sum of RM26 million was due from the defendant to the plaintiff. The plaintiff then agreed to assign its rights to UMBC.

From the historical background it would appear that the assignment in this case is an absolute assignment . It is not by way of charge only.

Now, under s. 4(3) of the Civil Law Act 1956 it is provided that:

> An absolute assignment ... shall be ... effectual in law ... to pass and transfer the legal rights to the debt or chose in action from the date of the notice and all legal and other remedies for the same ...

Under this section the Act has fixed the date of the transfer of the cause of action in respect of the subject matter of the assignment from the date of a notice to the debtor of the assignor. It must be noted that this effectual date cannot be altered by the parties or the Court. The effect of the assignment is that the legal rights and other remedies against a debtor are transferred to the assignee. The assignor has no more right to sue the debtor.

The notice of assignment was given to the defendant on 12 November 1984 by UMBC's solicitor's letter. Under s. 4(3) of the Civil Law Act 1956 therefore the assignment became effectual as from that date. Nothing that happens after that date can operate to alter the effect of s. 4 (3) of the Act . The conduct of either the defendant or the plaintiff after the date of assignment became effectual cannot take away the right which has been vested in the assignee, UMBC. This right would include the right of action against the defendant which under this

assignment has already been transferred to the assignee. It is immaterial that the defendant's conduct may be unmeritorious, it cannot invest in the plaintiff with the cause of action which he has assigned to UMBC.

I would agree with the defendant that the plaintiff has assigned its right absolutely to UMBC and cannot therefore maintain this action. On this ground alone it would be sufficient in law for the action to be dismissed.

Estoppel

In paragraph 14 of the amended statement of claim the plaintiff alleges that the defendant represented to it that it will receive a sum of RM226,336,730.59 sen and that the defendant is estopped from denying that that sum is due. The plaintiff's basis for the allegation is that the plaintiff has been assessed by the Income Tax Department to income tax for the year 1981 in the sum of RM96,616,015 on the basis that the plaintiff is entitled to receive from the defendant a sum of RM236,252,030. By letter dated 21 December 1985 the defendant was appointed under s. 68(1) of the Income Tax Act 1967, by the Inland Revenue Department to be the agent to collect money on behalf of the Income Tax Department. The plaintiff says that the defendant failed to appeal against that appointment and therefore by conduct acknowledged that the sum of RM226,336,730.59 is due from the defendant to the plaintiff and therefore is estopped from denying that such sum is due to the plaintiff.

There is no evidence to show that the plaintiff has made any representation to the defendant that there is a sum of RM226 million due to the plaintiff from the defendant.

In his evidence PW1 admitted that the plaintiff has appealed against the assessment which can only mean that the plaintiff does not agree with the assessment. It is obvious that the plaintiff disputes the tax assessment which is based on the figure of RM226,336,730.59 sen. The plaintiff cannot now say that this sum is due from the defendant as the figure is now being disputed. It is ludicrous to say on the one hand, that a certain sum of money is owing but in the same breath say that that sum is not correct.

On those facts there is no basis whatsoever on which the alleged estoppel can operate. There is therefore no merit in the allegation of estoppel and ought to be dismissed.

Compensation

What is the real dispute between the parties? The documents A214, A615 clearly show that the dispute is in truth only in respect of the sum of RM29 million or RM30 million compensation. It is the amount of compensation to be paid by the plaintiff to the defendant for the loss of bungalow lots presold by the plaintiff before the parties entered into the Joint Venture Agreement.

The figure claimed by the defendant, a sum of RM29 million is not seriously challenged. The plaintiff PW1 disputed the formula used in arriving at the figures. But after going through the evidence, particularly the evidence of DW2, the compensation figures have changed and varied by various agreement and meetings between the parties. PW1 admitted that he is bound to pay the compensation and that he is willing to do so. It is only the price that he is not happy about. However the formula was not challenged. The selling price of houses were given to the plaintiff but the plaintiff never disputed that. Then the figure of RM29,880,000 was presented to the plaintiff at the meeting on 18 January 1983 as the sum of compensation due to the defendant. This figure was accepted by the plaintiff.

The issue to me is very simple. Having considered the evidence as a whole I found that both parties have agreed on the formula to be used to calculate the amount of compensation to be paid to the defendant. The parties agreed that the sum due is RM29,880,000.

In the event I hold that judgment be entered in favour of the defendant in the sum of RM29,880,000 as compensation for the loss of the bungalow lots.

Plaintiff's Claim

This case which started as a "construction" case has now changed into a "claim" case.

Evidence has been led to supplement the facts and question to be interpreted and instead of a straightforward "construction" of agreement the plaintiff now claims for certain sum of money. Not money which is actually owing but money which he says should be paid to him.

I have dealt with the issues relevant to the prayers set out in the claim and I have given the answers variously to each of the claim. To

summarise them my findings on the prayers are:

(1) the defendant has not acted in breach of its fiduciary duties;
(2) the plaintiff is not entitled to receive from the defendant a sum of not less than RM189,341,378.88;
(3) the Court makes no order to assess a sum of money or other entitlement which the plaintiff is entitled to receive from the defendant.

For the above reasons I would dismiss the plaintiff's claim with costs and enter judgment for the defendant in the counter-claim under prayer 15(a) for the sum of RM29,880,000 as compensation with costs.